UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

DOCTOR'S MEDICAL CENTER OF MODESTO, INC., d/b/a DOCTOR'S MEDICAL CENTER OF MODESTO	**(Modesto, California)**
Employer[1]	
and	
NATIONAL UNION OF HEALTHCARE WORKERS	**Case 32-RC-5711**
Petitioner	

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Doctor's Medical Center of Modesto, Inc., d/b/a Doctor's Medical Center of Modesto, herein called the Employer, is a California corporation that is engaged in the operation of an acute-care hospital in Modesto, California. National Union of Healthcare Workers, herein called the Petitioner, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time technologists I, II, and III employed by the Employer at its Modesto facility, herein called the Facility. At the hearing, Petitioner amended its petition to clarify that the unit it seeks consists of all full-time, part-time, and per diem cardiovascular radiology technologists, cardiovascular interventional technicians, and CPACS

[1]The name of the Employer appears as corrected at the hearing.

administrators (herein collectively called the Cardiovascular Techs) employed by the Employer at the Facility. Petitioner contends that this unit is a residual technical unit consisting of all technicians employed by the Employer at the Modesto facility that are not part of a technical unit currently represented by SEIU, United Healthcare Workers West, herein called UHW.

A hearing officer of the Board held a hearing on February 16 and 17, 2010, and the parties filed post-hearing briefs with me, which I have duly considered.[2]

As evidenced at the hearing and in their briefs, the parties disagree over the threshold issue of whether, in an acute-care hospital where there is an existing nonconforming unit under the Board's Health Care Rule,[3] the Board will process a petition by a different labor organization for a separate residual unit consisting of the remaining unrepresented employees. The Employer contends that absent exceptional circumstances, which are not present here, it is inappropriate to process this petition, since it could result in the creation of yet another nonconforming unit, thereby violating the policy against a proliferation of units in the healthcare industry. Accordingly, the Employer asserts that since the UHW has declined to appear on the ballot, the petition should be dismissed. Alternatively, the Employer asserts that if an election is directed, the UHW's name must be placed on the ballot, even over its objection. By contrast, Petitioner contends that an election should be directed in the petitioned for

[2]The UHW was notified of the instant proceeding but advised the Region that it did not wish to appear at the hearing or intervene in these proceedings and it does not want to appear on the ballot of any election ordered herein.

[3] 29 CFR Sec. 103.30; 284 NLRB 1580-1597 (1987).

residual technical unit or, alternatively, in whatever residual unit the Regional Director deems appropriate. The parties also addressed a second issue regarding whether the voting group in the election should be restricted to those technical employees who are residual to the old technical unit (a unit that has not existed since 2004), or whether the voting group should be expanded to include biomedical techs who are residual to the UHW's merged unit of technical, service, maintenance, skilled maintenance, and office clerical employees (hereinafter called the Merged Unit).

I have carefully considered the evidence and the arguments presented by both parties on these issues. As set forth below, I have concluded, in agreement with Petitioner, that it is appropriate to direct an election in a residual unit in an acute care facility where there is an existing nonconforming unit even if the petitioning union is not the incumbent union and even if this results in the certification of an additional nonconforming unit. Moreover, in agreement with Petitioner, since the UHW has advised the Region that it does not want to participate in this proceeding, I will not place UHW's name on the ballot or require that the election be in the entire unit represented by the UHW. However, in contrast to both Petitioner and the Employer, I find that to be appropriate, and to avoid needless proliferation of units, this residual unit must include biomedical techs who are residual to the currently existing Merged Unit. Therefore, I will direct an election in a residual unit consisting of all full-time and regular part-time cardiovascular radiology technologists, CPACS administrators, cardiovascular

interventional technicians, imaging services specialists, and biomedical equipment technicians II employed by the Employer at its Modesto facility.

There are approximately 16 employees in the residual unit.

THE FACTS

Background

The Employer operates an acute care hospital in Modesto, California. On May 26 and 27, 2004, pursuant to Consent Election Agreements in Cases 31-RC-8381 and 31-RC-8382 between the Employer and the UHW, a representation election was conducted at the Modesto facility. A majority of the valid ballots in both elections were cast for the UHW. Accordingly, on June 9, 2004, a certification of representative issued in Case 31-RC-8381 certifying the UHW as the representative of the following unit:

> All full-time, part-time and per diem service and maintenance, skilled maintenance and business office clerical employees employed by the Employer at its hospital facility located at 1441 Florida Avenue, Modesto, California; excluding all other employees, professional employees, registered nurses, confidential employees, physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office System or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer and already represented employees, guards, managers and supervisors as defined in the Act.

On that same date, a certification of representative issued in Case 31-RC-8382 certifying the UHW as the representative of the following unit:

> All full-time, part-time and per diem technical employees employed by the Employer at its hospital facility located at 1441 Florida Avenue, Modesto, California; excluding all other employees, professional employees, registered nurses, confidential employees,

> physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office System or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer and already represented employees, guards, managers and supervisors as defined in the Act.

However, on May 27, 2004, before the ballot count, the UHW and the Employer reached a verbal agreement to exclude from the technical unit a group of about twelve Cardiovascular Techs. In this same meeting, because the UHW and the Employer were unable to come to agreement regarding whether a separate group of four Biomedical Techs were technical employees who should be eligible to vote in the technical unit in Case 32-RC-8382 or skilled maintenance employees who should vote in the service/maintenance unit in Case 32-RC-8381, the UHW and the Employer reached a second verbal agreement to exclude the Biomedical Techs from both units. Region 31 was not advised of either of these verbal agreements.[4]

The Bargaining History

After the respective Certifications of Representative issued, the UHW and the Employer entered into negotiations for an initial collective bargaining agreement. During the course of that bargaining, they reached an agreement to combine the technical unit with the service/maintenance/clerical unit. A single

[4] Under Section 102.30(b) of the Board's Healthcare Rule, "The Board will approve consent agreements providing for elections in accordance with the above rules, and no other agreements will be approved." Thus, had Regional Director for Region 31 been advised of the parties' verbal agreement to exclude the Cardiovascular Techs from the unit, he may not have conducted the election in this nonconforming unit. However, even in the healthcare industry the parties are always free in post-certification bargaining to alter the scope of a recognized conforming unit and to voluntarily create a nonconforming unit. There is no mechanism in the Act to upset such a post-certification voluntarily created nonconforming unit.

collective bargaining agreement was then drafted with language reflecting that the two units had been combined into the new Merged Unit. This same language was repeated in the current agreement (herein called the Agreement), which is effective by its terms for the period from January 1, 2007 to March 31, 2011. It is undisputed that the Cardiovascular Techs and the Bio-Med Techs were excluded from coverage under both of these contracts and that to date they remain unrepresented. Both Petitioner and the Employer agree that the Cardiovascular Techs are the only unrepresented technical employees employed by the Employer at the Modesto facility. Both Petitioner and the Employer also take the position that the Biomed Techs are skilled maintenance employees, rather than technical employees, and that while they are residual to the existing Merged Unit, they are not residual to the old technical unit. Finally, neither Petitioner nor the Employer asserts, and the record does not contain any evidence, that there are any other unrepresented employees (other than the Cardiovascular Techs and the Biomed Techs) who are also residual to the Merged Unit.

ANALYSIS:

Is It Appropriate To Process A Petition By A Non-Incumbent Union Seeking An Election In A Nonconforming Residual Unit In An Acute Health Care Facility?

When the Board issued its 1989 rule regarding appropriate units in the healthcare industry, it specifically deferred resolution of the issue of whether it would process a petition by an incumbent union for a separate residual unit consisting of the remaining nonrepresented employees that are residual to its existing represented nonconforming unit. Thereafter, in *St. John's Hospital,* 307

NLRB 767 (1992), the Board held that it was appropriate to hold such an election. The Board stated that the election would have to include all of the remaining residual employees of the same type as the existing nonconforming unit and that an incumbent union wishing to represent these residual employees could do so only by adding them to the existing unit, usually by way of a self-determination election.

Eight years later, in *St. Mary's Duluth Clinic Health System,* 332 NLRB 1419 (2000), the Board was faced with the identical issue presented by the instant case – namely, whether it should process a petition for a separate residual unit filed by a union other than the union representing the unit to which it is residual. The Board answered this question in the affirmative. In so holding, the Board first looked to the language of the Rule itself, which provides that, where there are existing nonconforming units, additional units will be found appropriate only if they conform "as far as practicable" to one of the enumerated units. The Board reasoned that an interpretation of this language that barred the processing of petitions like the one in this case, as the Employer urges, would render this language superfluous. Instead, the Board reasoned that this language should be read to allow new nonconforming units as long as they conformed as closely as possible to one of the eight presumptively appropriate units.[5] With regard to the argument that only an incumbent union can file a

[5] On brief, the Employer argues that the Board's decision in *St. Mary's Duluth* should not be read as a general pronouncement that in the healthcare industry the Board will process petitions for separate residual units filed by nonincumbent unions. Rather, the Employer argues that St. *Mary's Duluth* is limited to cases where the residual unit is as large or larger than the existing unit and the two units have a disparity in their community of interests. Contrary to the Employer's narrow reading of the case, I find that the broad language used by the Board in *St. Mary's Duluth*

petition for a residual unit election, the Board then cited its decision in *Crittenton Hospital,* 328 NLRB 879 (1999), in which it concluded that it was not the intent of the Rule to require the abandonment of, and replacement of, existing historical units with units that specifically conform to those set forth in the Rule. Rather, the Board held that the Rule should be read consistently with the Board's longstanding policy of giving deference to collective-bargaining history and the promotion of industrial and labor stability. Therefore, in *Crittenton Hospital,* the Board refused to interpret the rule in the way the employer urged, finding that this would require an incumbent union which may have a long and harmonious bargaining relationship with an employer, to represent employees it may not wish to represent or to require a petitioning outside union to raid the incumbent union's existing unit, thereby violating the Board's longstanding policies favoring industrial peace.[6] As a result, even though the Board noted that it must be mindful of the congressional admonition against the undue proliferation of units in the healthcare industry, it held that it must weigh this concern against its established policy of giving deference to existing collective bargaining relationships. Moreover, the Board reasoned that reaching this conclusion would preserve the rights of unrepresented employees to seek union representation, which rights would be foreclosed if the incumbent union did not wish to represent

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means just what it says – "that a nonincumbent union may represent a separate residual unit of employees in the healthcare industry." Id. at 1420.

[6] On brief, the Employer argues for the exact opposite conclusion, asserting that I should adopt a policy requiring a nonincumbent union to raid the incumbent union's existing unit by filing a petition for an election in the entire unit, rather than in just the residual unit. I reject this invitation for the same reasons that the Board cited in *St. Mary's Duluth,* supra, namely, the Board's longstanding policies favoring industrial peace and giving deference to existing collective bargaining units. Id. at 1421.

them.[7] Accordingly, in *Crittenton Hospital,* the Board concluded that it was appropriate to process a petition by a nonincumbent union for a residual unit of employees in the healthcare industry.

In the case before me, since Petitioner is a nonincumbent union seeking a residual group election in an acute healthcare facility where the incumbent union does not seek to represent these employees, the instant case is on all fours with the situation in *St. Mary's Duluth,* supra.[8] Accordingly, for the reasons set forth by the Board in that decision, I will process the instant petition and direct an election in the appropriate residual unit.

Are The Biomed Techs Technical Employees Or Skilled Maintenance Employees?

At the hearing, both Petitioner and the Employer agreed that the Biomed Techs are skilled maintenance employees rather than technical employees. I

[7] On brief, the Employer disputes this contention, arguing that the Cardiovascular Techs would not be denied their Section 7 rights if this petition is dismissed because in 2004 the employees who filled those positions "vehemently demanded not to be included in the original technical unit" and there is no record evidence that the Cardiovascular Techs have now changed their minds. However, this argument runs completely counter both to the facts and to well-established Board law. The fact that many of the employees who occupied the Cardiovascular Tech positions in 2004 may not have wanted union representation in no way serves as a bar for the employees occupying those positions in 2010 from concluding that they now want such representation. The fact that Petitioner has produced a showing of interest sufficient to support the petition in this case belies the Employer's contention that there is no evidence that these employees have changed their minds about union representation. Moreover, the Employer's position runs counter to the Board's election bar rules, which only prohibit the holding of a new election for one year after an unsuccessful previous election, thereby recognizing that employees sometimes change their minds about representation. Finally, I find that the surest way to preserve and determine the Section 7 sentiments of the Cardiovascular Techs is to direct an election in which they will have an opportunity to express those sentiments by means of a secret ballot.

[8] See also, *Kaiser Foundation Health Plan of Colorado,* 333 NLRB 557 (2001) (nonincumbent union can petition for election in residual unit of employees at a non-acute-care health facility). The Board's decision in *Kaiser* provides further support for my conclusion that *St. Mary's Duluth* should not be read as narrowly as the Employer urges. Thus, in *Kaiser* the Board processed a petition filed by a nonincumbent union for a group of 61 employees who were residual to the incumbent union's existing group of 1600 employees. The Board's decision to process the petition for a nonconforming unit was not based in any way on whether the proposed residual unit was as large or larger than the incumbent union's existing unit or whether the interests of the employees in the residual unit were divergent from those in the incumbent unit.

find that the record and the case law fully support this position. Thus, the record reflects that the Biomed Techs are employed in the Plant Operations Department along with the Employer's maintenance department employees; they are supervised by the Plant Operations Director, the same supervisor as the maintenance employees; their job duties consist of performing maintenance on patient care equipment; they are not certified or licensed by the State; and their training and educational requirements are akin to the training received by other maintenance employees. By contrast, the technical employees work in the Diagnostic Imaging Department; they are supervised by the Director of the Diagnostic Imaging Department; their job duties consist of utilizing patient care equipment to perform diagnostic tests on patients; they are certified by the State; and their training is akin to that received by the other technical employees. Thus, the record supports the parties' position and my finding that the Biomed Techs are skilled maintenance employees rather than technicians. *The Toledo Hospital,* 312 NLRB 652 (1993).

Must The Biomed Techs Be Included In The Residual Unit?

Having determined that it is appropriate to direct a residual unit election in this case, the only remaining question is whether this unit should consist of just those employees who are residual to the old technical unit (i.e. the Radiology Techs), as urged by both the Employer and Petitioner, or whether the only appropriate residual unit consists of both the Radiology Techs and the Biomed Techs. As set forth in the Statement of Facts, supra, the June 9, 2004 Certification of Representative in Case 31-RC-8382 certified the UHW as the

representative of a separate technical unit. The petitioned for group of Radiology Techs are residual to this old technical unit. The Biomedical Techs are residual not to this technical unit, but to the separately certified service, maintenance, and clerical unit. However, it is undisputed that during the collective bargaining subsequent to the 2004 certifications, the UHW and the Employer agreed to merge the technical unit with the separately certified service, maintenance, skilled maintenance, and clerical unit. It is also undisputed that this Merged Unit has remained intact ever since, and is the unit set forth in the Agreement.

Under these circumstances, I find that the only appropriate residual unit in which I should direct an election in this case is a unit consisting of all of the employees who are residual to this Merged Unit, rather than to a unit limited to those employees who are residual to the now defunct technical unit. In so holding, I first note that the Healthcare Rule specifically authorizes the parties to voluntarily combine any of the eight recognized appropriate units. I then rely on the reasoning of the Board in *St. Mary's Duluth,* supra, in which it noted "In both *Kaiser* and *Crittenton,* the Board concluded that it was not the intent of the Rule to require the abandonment of, and replacement of, existing historical units with units that specifically conform to those set forth in the Rule." 332 NLRB at 1421. Thus, in an acute care hospital where there are existing historical nonconforming units, to be appropriate a residual unit must be coextensive with one of those historical units. In the case before me, that historical unit is the Merged Unit, rather than the old technical unit that has not existed since 2004.[9] Moreover, I

[9] This conclusion parallels the Board's longstanding policy in decertification proceedings that the voting unit must be coextensive with the currently recognized unit, rather than with some

note that the position urged by both Petitioner and the Employer could potentially result in separate residual units of technical employees (the Radiology Techs) and skilled maintenance employees (the Biomed Techs). Such a result would run contrary to the policy behind the Healthcare Rule requiring me to avoid a needless proliferation of units in the healthcare industry.[10] Accordingly, since it is undisputed that both the Cardiology Techs and the Biomed Techs are residual to this Merged Unit, and since neither party contends and there is no record evidence that there are any other unrepresented employees who are residual to the Merged Unit, I find that the residual unit necessarily consists of both the Radiology Techs and the Biomed Techs.[11]

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

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historical unit that went out of existence years ago. A merger of units normally has the effect of destroying the separate identity of the prior units. See, e.g., *Campbell Soup Co.,* 111 NLRB 234 (1955); *White-Westinghouse Corp.,* 229 NLRB 667, 672 (1977).

[10] See also, *The Los Angeles Statler Hilton Hotel,* 129 NLRB 1349 (1961) (where there is a bargaining history showing that the employer has bargained on a multiemployer basis, the only appropriate residual unit is all unrepresented employees of the type covered by the petition on a multiemployer basis; a petition for a residual unit of the unrepresented employees of only one employer was dismissed). Although the *Staler Hilton* decision involved bargaining in a multiemployer unit rather than a merged single-employer unit as in the instant case, I find that the rationale behind this decision supports my finding that the only appropriate residual unit is a unit residual to the Merged Unit rather than to the old technical unit that no longer exists. The established bargaining history in the Merged Unit determines the scope required for a residual group election involving the Radiology Techs and the Biomed Techs, since they are in excluded fringe classifications which otherwise lack homogeneity, cohesiveness, or separate identity, and are merely residual to the main body of employees in the established Merged Unit. *St. Luke's Hospital,* 234 NLRB 130 (1978).

[11] At the hearing, Petitioner indicated that it is willing to proceed to an election in this larger unit. Based upon an administrative investigation, I have determined that Petitioner has a sufficient showing of interest to proceed to an election in this larger unit.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cardiovascular radiology technologists, CPACS administrators, cardiovascular interventional technicians, imaging services specialists, and biomedical equipment technicians II employed by the Employer at its Modesto, California facility; excluding all other employees, employees currently represented by another labor organization, professional employees, registered nurses, confidential employees, physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another Tenet entity, such as Syndicated Office System or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer, guards, managers and supervisors as defined in the Act.

There are approximately 16 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will

vote whether or not they wish to be represented for purposes of collective bargaining by **National Union of Healthcare Workers**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **March 10, 2010.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional

Office by electronic filing through the Agency's website, **www.nlrb.gov**[12], by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of the list will continue to be placed upon the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

[12] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 17, 2010.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[13] but may **not** be filed by facsimile.

Dated: March 3, 2010

/s/ Michael Leong
Michael H. Leong, Acting Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

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[13] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.